YAP KIM KEE

v.

WONG HENG KIT

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2(S1)-24-200-1999]
19 APRIL 2000

CIVIL PROCEDURE: *Parties - Non-joinder of party - Application for removal of caveats on property - Plaintiff one of four beneficiaries of property - Whether plaintiff could institute proceedings without joining other beneficiaries as parties to action - Rules of the High Court 1980, O. 15 rr. 6(2)(b)(i), 12*

The plaintiff, one of four beneficiaries named in a trust deed, applied to remove two private caveats lodged by the defendant on the properties held on trust therein. The defendant raised a preliminary objection that the plaintiff could not institute these proceedings without joining the other beneficiaries as parties to the action.

Held:

[1] The plaintiff could not institute these proceedings without joining the other beneficiaries as parties to the action. The plaintiff neither complied with O. 15 r. 6(2)(b)(i) nor O. 15 r. 12 of the Rules of the High Court 1980. As the preliminary objection was successfully raised, there was no necessity to go into the merits of the case.

[Preliminary objection upheld.]

Case(s) referred to:
Eh Riyid v. Eh Tek [1976] l MLJ 262 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 323, 329(1)
Rules of the High Court 1980, O. 15 rr. 6(2)(b)(i), 12(1), O. 16 rr. 1, 9

For the plaintiff - SK Lam; M/s SK Lam, Wong & Yap
For the defendant - H Kanda; M/s Peter Yip & Yong

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

The Application

This is the plaintiff's application to remove two private caveats lodged on land held under Geran No. 26266, Lot No. 3957 in the Mukim of Kuala Lumpur (the 1st property) and under Geran No. 26271, Lot No. 3963 in the Mukim of Kuala Lumpur (the 2nd property) and for payment of compensation under s. 329(1) of the National Land Code (the NLC) to be assessed and to be paid by the defendant with costs. There was also a prayer for such further and other relief that the court found reasonable to award.

Facts

The said 1st and 2nd properties (the properties) were registered in the name of one Tan Cheng Soon (Tan). By a deed of trust dated 6 March 1973 the said Tan confirmed that the said properties were registered in his name as trustee for four beneficiaries, namely:

(1) Tan Voon Kim (30% shares)

(2) Yap Kim Kee (45% shares)

(3) Loh Tian Loke @ Low Tian Loke (5% shares)

(4) Koo Seong How (20% shares)

in the respective shares appearing against their names. It was also a term, *inter alia*, of the trust deed that the trustee holds the said properties in trust for the named four beneficiaries and that he would transfer, charge, lease or otherwise deal with the said lands as the beneficiaries would direct, provided that all costs of and incidental to such dealings be borne and paid for by the said beneficiaries. The plaintiff herein is one of the four named beneficiaries. Even before the creation of the said trust deed the said Tan had executed the Form 14A when he received the said properties from the developer, as trustee.

On 15 April 1997 the defendant entered private caveats over the said properties. The reason stated in the Form 19B pursuant to s. 323 of the NLC for entering the caveats was that he had paid an earnest deposit of RM4,000 on 4 October 1997 towards the purchase of each of the said two properties. There was however no sale and purchase agreement annexed. The plaintiff however averred in his affidavit in support of the application to remove the caveat, that to his knowledge no beneficiary, including himself, had authorised

the sale. However, when the plaintiff's solicitors wrote to the defendant's solicitors to enquire who the alleged vendor was of the said properties, the defendant's solicitors replied that the said vendor was Tan who had passed away before the execution of the sale and purchase agreements.

In his reply affidavit (encl. 10) the defendant averred that the said Tan has put in the market, through an estate agent named Mohd Nor & Partners Sdn Bhd, the said properties for sale and that he had on or about 8 April 1997 made the said payments referred to earlier, to the said estate agent, towards the purchase of the said properties. The said Tan had informed him at subsequent meetings that he had had the consent of the beneficiaries to effect the said sale. Whilst the sale and purchase agreements were being prepared the said Tan even allowed him to take possession of the 1st property since the defendant's land adjoined the said 1st property. He has since been paying the assessment and quit rent towards the said property.

In his reply the plaintiff averred that to his knowledge neither Tan nor the beneficiaries had appointed the said estate agents to effect the said sale. He also denied the contention that Tan had the consent of the beneficiaries to effect the said sale. He also contended that the defendant had no authority to enter into possession of the 1st property.

Findings Of The Court

At the outset, Ms. Kanda for the defendant raised a preliminary objection. He contended that the plaintiff could not institute these proceedings without joining the other beneficiaries as parties to the action. I agree. O. 15 r. 6(2)(b)(i) and O. 15 r. 12(1) of the Rules of the High Court 1980 (the RHC) are the relevant rules. They read as follows:

Order 15 r. 6(2)(b)(i) –

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

…

(b) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

…

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

Order 15 r. 12(1) –

12.(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In *Eh Riyid v. Eh Tek* [1976] l MLJ 262 the then Federal Court had to consider an almost similar issue. At that time it was the Rules of the Supreme Court 1957 that applied and the equivalent rules were O. 16 r. 1 and O. 16 r. 9. I can do no better than cite a passage from the judgment of Raja Azlan Shah FJ (as His Highness then was) at p. 263. This is what his Lordship said:

To my mind where as here there are 4 persons with individual rights of their own, there are two ways in which actions may be brought to establish their respective rights in one and the same action. One is to resort to Order 16 rule 1, by joining all of them as plaintiffs; the other is under Order 16 rule 9 by one named person bringing a representative action in respect of himself and numerous other persons. … The policy of Order 16 rule 1 is to prevent repetition of cases of the same character and to save unnecessary expense. The plaintiffs are joined together by consent and are endowed with the status and responsibilities of ordinary litigants, for example, are liable for costs if they fail, and can be ordered to give discovery or to answer interrogatories.

Further down the page his Lordship said:

… Under that rule (O. 16 r. 9) the plaintiff, a named person, may institute proceeding without joining the other beneficiaries. But he must as the rule requires bring the action in a representative capacity. It is in my opinion not correct to interpret the rule as implying that it allows a person to bring an action without stating in the writ that he brings it in a representative capacity. That interpretation offends the language of the rule and the authoritative statements given to it and I can find in none of them the slightest justification for bringing a representative action under such circumstances as in the present case.

In *Eh Riyid* the plaintiff had brought an action to correct an error in the land register. The land belonged to the plaintiff's grandmother. The plaintiff was one of the beneficiaries of the estate of the grandmother but he did not join the other beneficiaries as plaintiffs nor was the action brought as a representative action. On a preliminary objection, the learned judge of the High Court dismissed the action and the Federal Court dismissed the appeal.

I would adopt the same principle here. The plaintiff in the case before me has neither complied with O. 15 r. 6(2)(b)(i) nor O. 15 r. 12 of the RHC.

Mr. Lam's arguments were based on the ground that his client was an "aggrieved party" pursuant to s. 329 of the NLC. That goes to the merits of the case. Mr. Lam must first cross the preliminary hurdle placed before him by the defence. To my mind, the plaintiff has stumbled. There is no necessity for me to go into the merits. I was satisfied that the preliminary objection was successfully raised and I therefore dismissed the appeal with costs.